Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Noncommercial Educational Station Fundraising for Third-Party Non-Profit Organizations	)	MB Docket Number: 12-106
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REPLY COMMENTS
OF
PROMETHEUS RADIO PROJECT

Brandy Doyle, Policy Director
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via electronic filing

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SUMMARY

The Prometheus Radio Project ("Prometheus") has been the leading advocate for Low Power FM ("LPFM") radio since the inception of the LPFM service in 2000. Prometheus led the successful campaign to pass the Local Community Radio Act of 2010, which directs the Commission to expand LPFM radio. We have helped to build and support hundreds of community radio stations nationwide, and we regularly advocate on behalf of stations' needs at the Commission and in Congress.

The recent report on "The Information Needs of Communities" recommended the Commission consider affording noncommercial broadcasters more flexibility by allowing noncommercial educational ("NCE") stations to engage in third-party fundraising for charities and non-profit organizations.[1] In response, the Commission has sought comment on allowing NCE broadcast stations to conduct on-air fundraising activities that interrupt regular programming for the benefit of third-parties in its *Notice for Proposed Rulemaking*.

In a number of *Comments*,[2] parties have expressed concern about the harm that allowing the regular interruption of NCE programming for third-party fundraising will cause. The parties contend that allowing up to 1% of airtime to be used for third-party fundraising will harm: (1) the station's ability to fulfill the mission of NCE service; (2) public confidence in public media; (3) a station's relationship with the community; and (4) the ability for stations to fundraise for themselves.

The Prometheus believes that these concerns are meritorious and should be cause for the Commission to continue to only allow third-party fundraising on NCE stations on a waiver basis. As many parties contend, the waiver process has been

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[1] Steven Waldman and the Working Group on Information Needs of Communities, The Information Needs of Communities: The Changing Media Landscape in a Broadband Age at 356 (June 2011), *available at* www.fcc.gov/infoneedsreport [hereinafter INC Report].

[2] New England Public Radio, *Comments*, filed July 23, 2012 [hereinafter NEPR Comments]; Chuck Miller, *Comments*, July 18, 2012 [hereinafter Miller Comments]; National Public Radio, *Comments*, July 23, 2012 [hereinafter NPR Comments]; University Station Alliance, *Comments*, filed July 17, 2012 [hereinafter USA Comments].

successful in providing opportunities for third-party fundraising while maintain the character of NCE stations.[3] While 1% of on-air time may seem like a small amount of time, 88 hours per year constitutes considerable amount of airtime in conjunction with stations' self-fundraising. Furthermore, it is unlikely that once the door is open for third-party fundraising that the 1% cap will remain. Even in the comments in response for the proposed introduction of a 1% cap a party is already seeking a 10% cap.[4] One party even asks the Commission to allow commercial advertisements on NCE stations.[5] It is likely that over time the amount of fundraising and perhaps even the type of interruptions allowed will increase until the integrity of NCE service is gone.

If the Commission goes forward with the proposed rule change, and we feel strongly that it should not, the Commission should proceed with caution and do so only under these conditions: (1) third-party fundraising must be disclosed on air; (2) Public Service Operating Agreements ("PSOAs") and Local Marketing Agreements ("LMAs") should be prohibited; (3) third-party fundraising should be local in nature; and (4) participation in third-party fundraising should be on an opt-in basis.

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[3] Loren Dobson, *et al.*, *Comments* at 4, May 29, 2012 [hereinafter Dobson Comments]; NEPR at 5; PBS at 9; USA at 1.

[4] Houston Christian Broadcasters, Inc., *et al.*, *Comments* at 5, July 23, 2012 [hereinafter Houston Comments].

[5] *See* Common Sense Alliance, *Comments*, July 17, 2012. Common Sense Alliance's comments solely addresses its disagreement with the 9th Circuit's recent decision in *Minority Television Project, Inc. v. FCC*, 676 F.3d 869 (9th Cir. 2012), in which the court upheld the commercial restriction in 47 U.S.C. 399(b)(1) under intermediate scrutiny. The 9th Circuit was correct in its analysis of § 399(b)(1). Common Sense Alliance's request is inapposite to the matter at issue.

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I. REGULAR ALLOWANCE OF THIRD-PARTY FUNDRAISING WILL HARM NCE STATIONS

Public broadcast stations are expected to rely on government subsidies, individual donors, grants, and corporate contributions instead of paid advertising.[6] In order to "'strike a reasonable balance between the financial needs of [public broadcast] stations and their obligation to provide an essentially noncommercial broadcast service' and eliminate those proscriptive regulations deemed unnecessary to preserve the media's noncommercial nature,"[7] the Commission determined over thirty years ago that stations could acknowledge contributions made by donors.[8] The focus "was specifically intended to benefit the station itself and its need for funding to continue to serve its local audience through noncommercial and educational programming."[9] The rule prohibiting noncommercial broadcasters from engaging third-party fundraising is "intended to prevent the reserved noncommercial spectrum from being used as a barker platform for fundraising, taking time away from the provision of noncommercial service."[10]

Allowing third-party fundraising is likely to change the character of noncommercial radio and could make people see it as "just another venue that charities use and where fundraising appeals are prevalent."[11] As New England Public Radio highlights, these change in the way the public perceives noncommercial radio would harm all stations—not just those who take part in third-party fundraising.[12]

Public confidence in media is an issue of epic proportions, with only 8% of people surveyed stating they trust commercial broadcast TV and 6% trusting

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[6] *See generally* 47 C.F.R. § 73.621.

[7] *Policy Statement*, 90 FCC 2d at 897, ¶ 3 (quoting *Second Report*, 86 FCC 2d at 141, ¶ 4).

[8] *See Second Report*, 86 FCC 2d at 142-143 ¶¶ 4, 7-8.

[9] *Notice of Proposed Rulemaking*, 22 FCC Rcd. at 4516 ¶ 3.

[10] INC Report at 317.

[11] NEPR Comments at 2.

[12] *Id.*

newspapers.[13] Yet public media retains a position of much greater public trust and credibility. Indeed, PBS was rated the most trusted American institution in 2011.[14] This position of trust has been carefully preserved through the Commission's rules as well as the editorial and community engagement policies of public radio and television stations. However, the allowance of third-party fundraising on noncommercial stations could serve to undermine the public's confidence in a station's editorial independence by introducing other entities that listeners may correlate with the station itself,[15] or by eroding the perceived distinction between noncommercial and commercial media outlets. Worse still, the public may lose trust in public media in general. The Commission should not adopt rules which unintentionally threaten the public trust in this vital institution.

Another potential harm posed by the expansion of third-party fundraising is the harm to stations' relationships with their communities. In this economy where non-profit organizations are struggling for funding, opening third-party fundraising on noncommercial broadcast stations not only creates competition for listener's donations between third-parties and the station itself, it also creates the potential for stations to be inundated with requests from local nonprofits.[16] This in turn creates a negative station/licensee gatekeeper effect, as stations will be forced to deny most requests and thereby damage community relations.[17] Commenters rightfully believe that turning down most requests may well jeopardize relationships with potential programming partners.[18] Prometheus agrees that allowing third-party fundraising without a waiver

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13 John Sterns, *Public Television: We're #1!*, FREE PRESS (Feb. 28, 2012), http://www.freepress.net/blog/12/02/28/public-television-were-1 (last visited Aug. 21, 2012).

14 *Press Release: PBS is #1 in Public Trust*, PUBLIC BROADCASTING CENTER, http://www.pbs.org/about/news/archive/2012/pbs-most-trusted (last visited Aug. 21, 2012).

15 NEPR Comments at 2.

16 NPR Comments at i,5; NEPR Comments at 3-4;

17 Miller Comments at 1; NEPR at 3-4; Phil Burger, Nevada Public Radio, *Comments* at 1, July 19, 2012 [hereinafter Burger Comments].

18 NPR Comments at i, 5 (highlighting that the current prohibition allows stations to avoid jeopardizing relationship by requiring a station to decline all requests for third-party

will harm the relationship between noncommercial stations their communities in unintentional ways.

Finally, third-party fundraising is likely to seriously jeopardize the fundraising efforts that noncommercial stations conduct on their own behalf. Fundraising is a vital issue for many noncommercial issues in 2012. In 2011, Congress looked to decrease funding for public broadcasting, and funds for local stations were cut heavily at the state level, and Congress has continued to consider cutes to public broadcasting funding.[19] And bad economic times affect public broadcasting as fewer people are able to donate.[20] Many small stations primarily receive funding from private donations through self-fundraising. Stations are rightfully concerned about the effect of the removal of the prohibition, particularly in this economy.

Even 1% of airtime used for third-party fundraising is likely to have a negative effect on the ability of stations to fundraise for themselves. Audiences may assume the station will receive some of the third-party revenue,[21] even with on air disclosures. NPR raises concern with listener fatigue and its effect on the station's own fundraising ability.[22] We concur. In our experience, most community stations, like public radio

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fundraising because the current rule "was designed to ensure that the public airwaves are to be used for the benefit of NCE stations and the audiences they serve.") *See also* NEPR at 3-4; Burger Comment at 1.

[19] John Sterns, *Public Television: We're #1!*, FREE PRESS (Feb. 28, 2012), http://www.freepress.net/blog/12/02/28/public-television-were-1 (last visited Aug. 21, 2012).

[20] Since 2008, 8.7 million people have lost their jobs. Braden Goyette, The Latest on Our Sputtering Economy, by the Numbers, ProPublica, Aug. 5, 2012, *available at* https://www.propublica.org/article/our-sputtering-economy-by-the-numbers. The cash revenue of public television stations eligible for Corporation for Public Broadcasting funding has fallen 14% since 1995, with a 37% drop in the number of donors. *available at* http://www.current.org/wp-content/themes/current/archive-site/funding/funding1202urgency.html *See also* Noelle Barton and Holly Hall, *Donations Dropped 11% at Nation's Biggest Charities Last Year*, THE CHRONICLE OF PHILANTHROPY (Oct. 17, 2010), http://philanthropy.com/article/A-Sharp-Donation-Drop-at-Big/125004/ (last visited Aug. 21, 2012).

[21] Miller Comments at 1.

[22] USA Comments at 2; NPR Comments at i, 5, 6-7.

stations, already conduct multiple fundraising drives throughout the year. Too-frequent on-air fundraising is known to cause listeners to tune out or even give less money.[23] NPR further points out that "[e]ven the appearance of using listener contributions to fundraise for third-party nonprofits, no matter how well-disclosed, could further erode membership" and that this could jeopardize NCE stations' own fundraising, which is largely based on member donations.[24]

The distinction drawn by some parties between stations receiving Corporation for Public Broadcasting ("CPB") and those who do not receive funding is a distinction without a difference.[25] All public media, not only CPB stations and religious stations, are crucial elements of the media ecosystem. The harms to CPB stations identified by CPB commenters and by religious station commenters are harms that affect many different types of public stations, not only CPB and CPB eligible stations. For example, LPFM stations are an integral part of the media ecosystem but are often not CPB eligible due to their smaller staff and budget size. Yet LPFM stations are often crucial sources of local news and information, especially those which reach underserved communities and communities that speak languages other than English. Maintaining trust and strong community ties is vital for these stations. Protecting on air self-fundraising is also crucial. In our 2011 survey of LPFM stations, the largest and most comprehensive LPFM survey ever conducted, 83% of survey respondents relied on individual donations to fund some portion of their station budget.[26] Prometheus recently consulted LPFM station representatives at the 2012 Grassroots Radio Conference, which serves smaller and largely non-CPB eligible stations, about the proposed rule change. All station representatives present opposed the third-party fundraising change.

Prometheus believes, along with many commenters, that these harms outweigh

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[23] ANNOYANCE WITH FUNDRAISING, WALRUS RESEARCH (2004) at 6, 7.

[24] NPR Comments at 6-7.

[25] Houston Comments at 3-4; NRB Comments at 3-4, 9-10; Public Broadcasting Service and the Association of Public Television Stations, *Comments* at 2,5, July 23, 2012.

[26] *Comments of Prometheus Radio Project*, In the Matter of the Economic Impact of Low Power FM Stations on Full-Service Commercial FM (Nov. 10, 2011).

the benefits of lifting the ban on third-party fundraising. We ask the Commission reject the proposed rule change in its *Notice of Proposed Rulemaking*.

II. IF ALLOWED, THIRD-PARTY FUINDRAISING SHOULD BE SUBJECT TO RESTRICTIONS

If the Commission proceeds to lift the prohibition on third-party fundraising, it should do so with restrictions designed to mitigate the potential harm identified by commenters.

Prometheus agrees that stations should be required to disclose the identity of third-party fundraising on air and that there should be a clear distinction between programming and fundraising.[27] Third-party identification provides transparency for listeners and may help to lessen or avoid damage to listener confidence in the station's programming. Correct identification also decreases the likelihood of confusion as to whom the beneficiary of the fundraising is and if it is intended to support the station itself or another entity.[28] Education Media Foundation dismisses the necessity of identification, arguing it would be *obvious* that an appeal for funds would reveal the identity of the party soliciting funds.[29] We disagree. It is not always obvious. Depending on the nature of the programming offered by the station and the format of the fundraising it is conceivable that listeners could easily mistakenly infer that third-party fundraising was actually fundraising for the station, particularly when the station has close ties to affiliated churches or non-profit organizations. Clear on air disclosure of third-party fundraising is a low cost and low impact solution. As such, we and a majority of commenters support such a disclosure.

Similarly, third-party fundraising that benefits interested parties in PSOAs and LMAs should be prohibited. These agreements create loopholes that could undermine the nature of the NCE service and puts the information needs of local communities at

[27] NRB Comment at 23.
[28] Loren Dobson, *Comment* at 1, filed May 29, 2012 [hereinafter Dobson Comment].
[29] EMF Comment at 6. Emphasis added.

great risk. Under the rule change, in cases where the operator is itself a non-profit, the proposed rule change would allow the operator to fundraise for its own benefit on the licensee's frequency, creating a conflict of interest.[30]

Loren Dobson, *et al*. provides the example of the arrangement of the proposed KUSF license transfer to the Classical Public Radio Network ("CPRN"), Public Radio Capital ("PRC") and University of Southern California ("USC") to illustrate how this loophole in the proposed third-party fundraising rules could provide broad avenues for abuse and support further consolidation in the NCE service. Although CPRN/USC/PRC were already operating the station in a PSOA, their on-air fundraising was at issue in a Letter of Inquiry from the Commission, due the restriction on third-party fundraising.[31] The Commission's proposed relaxation of third-party fundraising rules could incentivize similar consolidation in the NCE service, thereby reducing diversity as nominally educational licenses are controlled by larger entities using them to fundraise.

> In this example Bay Area listeners have been led to believe their donations goes directly to KDFC-FM [the station for which the PSOA operators fundraised using the KUSF license],[32] although they are actually diverted to the eight-station network—which includes a 10% share owned by PRC. As such, listeners are financing further acquisitions. USC's educational status serves to create a halo for these transactions and provide a means to meet FCC qualifications, but no direct relationship with the educational entity (or their students) exists in the traditional sense. Beyond this, USC—a 90% owner of CPRN—stands to profit from trading on its [sic] educational status beyond the intended purpose of providing a local public service to the local community

[30] Dobson Comment at 1.

[31] *Letter of Inquiry*, 26 FCC Rcd. 9251 (June 28, 2012).

[32] Clarification added.

> surrounding their own campus.
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> This activity builds a market for NCE licenses that is not aligned with their intended use. USF received the 90.3 FM license for a nominal cost in 1973 to serve its [sic] students and the people of San Francisco. Carrying shared programming with a network of eight other non-local stations, controlled by various LLC interests, and based in Southern California—runs against this intent. Furthermore, commodifying NCE licenses puts traditional educational licensees under undue pressure to divest themselves of assets meant to serve local communities.
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> The proposed rulemaking may also serve as an incentive for NCE licensees to enter into longer-term PSOA/LMA agreements as a means to perform fundraising for the benefit of the interim operator. This may comply with the letter of the modified rule, but conflicts directly with the spirit and purpose.[33]

This example illustrates how third-party fundraising could unintentionally undermine the integrity of the NCE service. As such, if the rule is adopted, an explicit prohibition against fundraising by PSOA and LMA operators for their own benefit or for a related entity should be included.

In a separate issue, New England Public Radio is concerned that "there can be no guarantee that this fundraising would 'be a useful way of informing residents about problems in their communities' because the Commission would have no control over which charities are chosen and what is said about them or about community issues during the fundraising."[34] Prometheus agrees. However, if such fundraising is permitted we concur with Loren Dobson, *et al*. that it should be subject to a locality restriction—third-party fundraising should be for a local, non-interested, third-party

[33] Dobson Comments at 1, 3.

[34] NEPR Comments 5-6, citing NPRM at 7.

beneficiary and should be produced locally.[35] Such a restriction has the best chance of benefiting the community by educating them about local issues because it has the strongest ties to the community.

In contrast, National Religious Broadcasters urges the Commission to reject a locality restriction.[36] Their proposal would allow stations to fundraise for all type of non-profit charities, including large national and international charities that may have no impact or connection with the station's local community. This type of fundraising seems at odd with the reasoning behind the third-party restriction in the first place. Local community stations could, for up to 1% of their airtime, be used as a barker platform for fundraising without hope of benefiting the community the noncommercial station serves. National Religious Broadcaster's proposal is New England Public Radio's fear.

Lastly, should the Commission adopt the proposed rules they should do so on an opt-in basis. Allowing stations to maintain the status quo may help to mitigate the potential harm created a station turning away a third-party by allowing the station to avoid being a station/licensee gatekeeper as well as other harms. Furthermore, it would reduce the paperwork burden on stations which do not wish to participate. National Religious Broadcasters are concerned with the forecasting required for opting into third-party fundraising. However, the procedure for opting in has not been determined, and it seems feasible to allow stations to do so at any time, provided that they file the appropriate paperwork. The Commission has the opportunity to compromise with an opt-in system. Those wishing to participate would have the burden of opting-in, to participate while those parties wishing to maintain the status quo would have no burden.

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[35] Dobson Comments at 4.

[36] National Religious Broadcasters, *Comments* at 15-16 (July 23, 2012).

CONCLUSION

In light of the potential harm to stations and questionable community gains that would result from up to 1% of air time used for third-party fundraising on noncommercial broadcast radio, Prometheus requests that the Commission maintain the prohibition currently in place. Should it proceed, in alternative we ask that the Commission impose restrictions on third-party fundraising to protect the integrity of the NCE service.

Respectfully submitted,

/s/

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via electronic filing

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